USAWC STRATEGY RESEARCH PROJECT

THE INTERNATIONAL CRIMINAL COURT AND FUTURE AMERICAN MILITARY OPERATIONS

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ABSTRACT

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The July 1, 2002 ratification of the Rome Statute establishing the International Criminal Court (ICC) was a significant and far-reaching accomplishment in the international legal system. The Statute gives the ICC the power to prosecute individuals for the most serious crimes of concern to the international community. Although the United States played a major role in the court's development, the U.S. officially withdrew from the ICC in July 2002, citing jurisdiction and treaty law concerns and unacceptable risk to U.S. military personnel.

The U.S. is negotiating bilateral agreements with individual countries and using its weight in the UN Security Council to influence the ICC in order to protect military personnel and high-ranking government officials from prosecution by the court. Both of these actions undermine the spirit of the ICC.

The American decision not to support the court is an important watershed in international relations, and will likely have long term effect on the ability of the ICC to reach the objectives of the Rome Statute. This paper will address the origins of the International Criminal Court, discuss how the ICC works, highlight U.S. objections to the statute, and analyze U.S. objections. This paper will assess the position that we have taken in terms of our grand strategy and how and why the government reached the conclusion that it would be in our best interest not to sign up for the ICC. Finally, this paper will assess how our position on this issue may affect our national security strategy with regards to other international issues, and the risks associated with our position on the ICC.

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> American servicemembers and national interests are better served by joining the Court and helping it fulfill its stated purpose—prosecuting individuals who commit the most egregious international crimes."
>
> —Major General William L. Nash, Ret. U.S. Army[1]

> Two-thirds of Americans support the ICC, but unless two-thirds of U.S. Senators are persuaded by constituents to take action, the ICC will never be ratified.
>
> —Yankelovich Poll, October 10, 20002

> [Signing the Rome Treaty on ICC will] reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity.
>
> —President Bill Clinton, upon signing the 1998 Rome Treaty3

> The crime of genocide against one people truly is an assault on us all – a crime against humanity. The establishment of an ICC will ensure that humanity's response will be swift and will be just.
>
> —U.N. Secretary General Kofi Annan4

> "[The ICC] assures a fair trial for any servicemember who is prosecuted by the ICC."
>
> —Colonel (ret.) Robinson O. Everett,
> former Chief Judge and current member of the
> U.S. Court of Appeals for the Armed Forces.[5]

It is almost inconceivable that the United States, a country founded on individual freedom and fully committed to humanitarian rights and interests, could not be a prime player, a leader, in an international institution with the objective of both preventing and punishing genocide, war crimes and crimes against humanity. Even more inconceivable is that the United States would adopt a position and take an approach that is not only adverse to the institution, but is destined in this writer's opinion to eventually undermine the institution. But, that is precisely the position that the United States has taken with regard to the Rome Statute of 1998, and the International Criminal Court that it created.

Over the last five years, the debate over the International Criminal Court has lost some of its media attention, but has remained quite intense and sharply divided. There are cogent

arguments on both sides of this issue, and they have been repeatedly made over the last five years. But, the debate, for all intents and purposes, came to an end with the passage of the American Servicemembers Protection Act of 2000[6] and the President's decision in May, 2002[7] to inform the United Nations that the United States would not be bound by the Rome Statute and would not recognize the International Criminal Court, effectively withdrawing the United States' signature from the treaty. Our approach, as expressed in the National Security Strategy of September 2002, is straightforward:

> We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept.[8]

In the introduction to the National Security Strategy (NSS) of September 17, 2002, the President of the United States clearly expresses our support and commitment to international organizations like the United Nations.[9] Indeed, throughout the National Security Strategy the theme of cooperation with our allies and the importance of coalitions are consistently repeated. In the same introductory letter, however, the President states that, in fighting the war on terrorism, we will "use every instrument in ***our*** [emphasis added] arsenal....and will hold to account nations that are compromised by terror..."[10] Even more specific is the pronouncement in Section IX that we will "ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for special investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept."[11]

This brief statement in the NSS not only clearly states our position on the International Criminal Court, in conjunction with other positions staked out in the strategy statement, it is also indicative of a major shift in our national security strategy with regard to how we may interact with international institutions on a wider variety of issues in the future.

The concept of a court of universal jurisdiction is complex. Even more complex, however, is how this controversy has come to resolution in relative anonymity, even though it is indicative of our current approach to foreign relations – dangerous or not. In explicit terms, the current administration has taken a hard line on the International Criminal Court. Despite the fact that numerous countries, including most western-type democracies, have given unqualified support to the Court, the United States has gone down a road from which there appears to be no turning back. In fact, with passage of the Armed Services Protection Act, congressional or judicial action will be required before the United States can support the Rome Statute and the International Criminal Court. The legal and political debate between opponents, proponents,

and legal scholars worldwide continues unabated, the intricate details of which are beyond the scope of this paper. The hard line position that the United States has taken, however, will have a lasting impact on our status in the international community and raises at least three pivotal questions that must be addressed: First, what impact will this hard line position have on the status of service members and citizens serving abroad? Second, as the recent capture of Saddam Hussein and other Iraqi leaders has illuminated, what alternatives are available on those occasions when an international criminal tribunal is clearly indicated as the solution? Third, and most importantly, what effect will our decision on the International Criminal Court have on our status in other international institutions and relationship with the international community in general? The purpose of this research paper is to address these important questions and offer some thoughts on where the debate might go in the future. The approach will be simple.

This paper will briefly review the history leading up to the establishment of the International Criminal Court, review the basic intent of the underlying statute, and highlight the position of the United States on the Court, including a brief survey of the primary objections. Further, this paper will assess the position that we have taken in terms of our grand strategy and how and why the government reached the conclusion that it would be in our best interest not to sign up for the ICC. Finally, this paper will assess how our position on this issue may affect our national security strategy with regards to other international issues, and the risks associated with this position.

THE ROME STATUTE AND THE INTERNATIONAL COURT - A BRIEF HISTORY

The concept of an international tribunal capable of prosecuting individuals for criminal conduct is not a recent phenomenon. In fact, this idea can be traced back at least to the to the Treaty of Versailles after World War I.[12] Of note, the United States strongly opposed the proposal to include provisions in the Treaty of Versailles which would authorize such trials.[13] The many proposals that were raised after World War I were never seriously considered because the nations of the world were concerned about three things: sovereignty, absence of an international code, and a very basic disagreement on the value of an international criminal tribunal.[14] Even though no tribunals were ever convened under the Treaty of Versailles, and despite the arguments against such international tribunals that persists to this day, the seed was planted for the trials that occurred after World War II.[15]

Post World War II, the renewed interest in a standing international criminal court and the model statutes that resulted were overcome by the political landscape at that time.[16]

Notwithstanding, the tribunals convened in Japan and at Nuremberg again underscored the need for some type of international tribunal to prosecute a narrow range of offenses. The tribunal at Nuremberg was created by international agreement, the London Accord, and its intent was to try "war criminals whose offenses have no geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities."[17] There is a bit of irony in the fact that the United States, as a member of the Allies, was instrumental in advocating the idea of individual responsibility, imposed by an international institution, for crimes against humanity, war crimes, and genocide. In fact, the United States had to convince the British that trials were preferable to summary execution of the Nazis.[18] Certainly, it is an oversimplification, or exaggeration, to conclude that the Nuremberg tribunal indicated a preference for a standing institution, but the basic premise cannot be ignored. What is significant, however, is that the Nuremberg defendants raised the same objections to the IMT that are being raised against the ICC: State sovereignty, primacy of national law, and the substantive law to be applied.[19] History tells us that all of the objections were rejected, and the trials went forward. What is also significant is the law that the Nuremberg IMT created – "the positive law thought to be lacking prior to its existence."[20] Despite all of the complaints lodged against the Nuremberg trials, the accusations of "victors justice" also attributed to the trials in Japan, one writer put it best – "…the Nuremberg judgment has been understood to affirm the idea that war as a means of solving interstate conflict is morally, legally, and politically wrong" and is consistent with the United Nations Charter.[21]

After the Nuremberg trials, interest in establishing a permanent international criminal court increased, particularly in conjunction with consideration of the Genocide Convention.[22] The United Nations General Assembly established the International Law Commission [or the Committee on Progressive Development of International Law] to show its commitment to the principles of the Nuremberg Tribunal charter.[23] The committee was charged to "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions."[24] The Commission could only agree that is was "desirable to establish an international penal judicial organ."[25] It was the Committee on International Criminal Jurisdiction that met in 1951 that produced a draft statute that would be markedly similar to the statute ultimately signed in Rome in 1998. This draft statute recognized the difficulties inherent in amending the United Nations Charter and, therefore, proposed an institution that would be based on a multilateral treaty. Very few nations even commented on the draft statute, and it

was generally thought to be unsound.[26] At the urging of the French and Dutch delegations, a second committee was convened in 1953 to continue the study, resulting in a revised version of the draft statute.[27] At this point, interest in the statute stalled, generally due to lack of consensus on whether such a court was desirable.[28] The idea of an international criminal court remained in limbo for the next thirty-six years, hampered by the Cold War[29] and a difference of opinion on the viability of such a court.[30] The idea was not raised again until 1989 when the General Assembly, at the urging of several countries, directed the International Law Commission to revisit the idea of establishing an international criminal court.[31]

The work of the working group created by the International Law Commission between 1992 and 1998 resulted in the draft statute that was to be debated vigorously in Rome. Even though several nations, including the United States, were sharply critical of the products created by the working group during this period, the effort received momentum from the United Nation Security Council creation of the International Criminal Tribunal for Yugoslavia.[32] The various problems encountered by that court, as well as the court established for Rwanda – obtaining prosecutors and judges, financing, arresting suspects – in many respects bolstered arguments for a permanent tribunal.[33] The result of over 40 years of study and debate was the Rome Statute[34], which establishes the International Criminal Court.

It is noteworthy that, even after 40 years, the issue was not settled – for five weeks in the summer of 1998, the debate surrounding the text of the Rome Statute raged on.[35] Most of the objections and recommendations for modifications were lodged by the United States delegation.[36] Even though the Clinton administration generally supported the concept of the International Criminal Court, the mission of the United States' delegation, led by David Scheffer, U.S. Special Ambassador for War Crimes, was to ensure that our primary objection to the Court, universal jurisdiction, was addressed through the complementarity provisions.[37] After considerable debate, apparent compromise, and over remaining objections from the United States delegation, the Rome Statute was adopted on July 17, 1998, on a favorable vote of 120 nations (7 against, 21 abstentions).[38] The events between adoption of the statute in 1998 and the end of 2000 are significant because even though the United States still had significant reservations about several provisions in the Statute, on 31 December 2000, as the period to sign the statute was about to expire, President Clinton signed the statute in substantially the same form as it existed in July 1998.[39] President Clinton's intent was clearly stated in his remarks on signing the treaty – confirm our commitment to the concept of the court and international justice, while reemphasizing our specific objections. Ironically, the Clinton

administration still categorically objected to a court that could indict United States citizens without prior United States approval. The administration insisted on a guarantee that the United States would have approval authority before indictment, even if the impact was to lessen the effectiveness and credibility of the Court.[40] At this point, the decision was made to attempt to effect change from the inside. His belief was that the United States would be better situated to influence the continuing development of the Court as a signatory than from without.[41] His recommendation to the Bush administration to withhold the treaty from Congress until our objections had been addressed was also a harbinger of the intense debate that would ensue for the next eighteen months. In light of the tenor of the debate that occurred between 1998 and 2000, President Clinton's approach was overly optimistic and, arguably, unrealistic.[42] In April 2002, the Statute was ratified by the 60th nation, bringing the statute into force. As of 4 July 2003, 91 nations had ratified the Statute. The Rome Statute went into effect on July 1, 2002, establishing a standing forum to investigate and prosecute instances of genocide, war crimes, and crimes against humanity worldwide.[43]

Notably, the Preamble to the Rome Statute[44] states that its purpose is to ensure that the most "serious crimes of concern to the international community as a whole ... not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and enhancing cooperation." The Preamble further states that the "International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." At the risk of oversimplifying the International Criminal Court concept, the objective of the Court is to provide a forum where individuals can be held accountable for listed crimes, without the need to resort to ad hoc tribunals such as the International Criminal Tribunal for Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR), and only in those cases where a state cannot or will not pursue prosecution.

UNITED STATES' CONTINUING OBJECTIONS TO THE ROME STATUTE/ICC

Even though then-President Clinton signed the Rome Statute just before leaving the Presidency, the United States has always objected to certain provisions without wavering, viewing the Statute and the Court as a whole as a potentially unacceptable violation of our sovereignty. In its simplest terms, our objection is to the authority of the prosecutor to independently initiate investigations. The United States proposed that states be allowed to choose from a short list of offenses to which it would subject its citizens and, more importantly, that the ICC's jurisdiction be based on consent rather that "universal" or "automatic" jurisdiction.[45] The counter-proposal offered by the United States would require United Nations

Security Council approval or endorsement of every prosecution, thereby giving the United States a vote in the process. Despite the valiant attempts to gain concessions from the committee, as well as several amendments and proposals designed to appease the United States, the Rome Statute was passed, in basically its current form.[46]

In the period between July 1998 and December 2000, the decision of the United States on joining the International Criminal Court was a subject of intense debate among international lawyers and policy experts, in the media, in Congress, and in the international community. [47] Objections to the Court, as indicated above, were most vociferous in the United States Congress. Dealing with the Rome Statute and the International Criminal Court, however, was left to the new Bush administration.

The Bush administration did not share the same optimism as the previous administration that compromise could be reached. In the period between December 2000 and May 2002, the administration, through the State Department, further clarified the list of objections.[48] In a speech to the Simon Bond International Wannsee Seminar in Berlin on July 9, 2002, Ambassador Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues, adds even more clarity to the United States objections.[49] The United States certainly does not propose that perpetrators of war crimes, genocide, and crimes against humanity be allowed to go unpunished. In the speech by Ambassador Pierre-Richard Prosper referred to above, he endorses the general principles contained in the Preamble to the Statute.[50] The point of departure is the acceptability of an institution like the ICC. The United States offers what it views as three viable alternatives for dealing with the types of matters currently under the jurisdiction of the ICC: Domestic accountability, international support, and international intervention through the United Nations Security Council.[51] What is clear, however, is that we have chosen to forego international institutions as a means of achieving these objectives.

CONGRESS' RESPONSE – THE AMERICAN SERVICEMEMBERS PROTECTION ACT (ASPA).

Although the debate in the United States on the basic concept continues to this day, Congressional response to President Clinton's signature of the Rome Treaty was swift and predictable. As noted above, the primary power brokers in Congress were adamantly opposed to the entire concept of an international court of universal jurisdiction. Along those lines, Congress took initial action to insure that no appropriated funds would be used to support the International Criminal Court.[52] The passage of the ASPA of 2002 not only signaled that the Rome Statute would never be ratified by Congress absent the significant changes demanded by

the United States, but also put significant pressure on the President to insure that its effects would never be felt by any United States citizen.

The stated intent of the ASPA was to preclude prosecution of deployed United States servicemembers in the International Criminal Court, and to prevent the prosecution of the President and other government officials for decisions based on national security. [53] The most significant provisions of the ASPA prohibit the government from cooperating with the International Criminal Court, and precludes deployment of servicemembers on United Nations peacekeeping missions abroad unless a waiver agreement, protecting participations from prosecution and the jurisdiction of the International Criminal Court, has been signed by the United Nations Security Council.[54] The ASPA also precludes the provision of military assistance to countries that are parties to the International Criminal Court absent an agreement with that country under Article 98 of the Rome Statute, which would protect United States citizens from the International Criminal Court.[55] Although the ASPA specifically exempts NATO members and other allies from this provision[56], and gives the President some latitude in deploying servicemembers abroad, the approach that the United States has taken, as will be seen below, has been to continue its hard line on the International Criminal Court and fully implement the provisions of the ASPA.

IMPACT OF THE INTERNATIONAL CRIMINAL COURT ON MILITARY OPERATIONS ABROAD

Article 98 of the Rome Statute states, generally, that the ICC may not demand action by any state where such act would be inconsistent with international law or with its obligations under an international agreement.[57] In addition to the certification required for United Nations peacekeeping missions,[58] the United States government has used Article 98 and the restrictions in the American Servicemembers Protection Act, as the bases for negotiating agreements with several countries.[59] The obvious intent of these agreements is to use the threat of termination of financial assistance to cancel out the extraterritorial jurisdictional aspects of the Rome Statute as applied to the United States. We have also made it clear that we will use whatever means necessary to rescue a United States citizen who might be surrendered to the ICC.[60] To date, the United States has been effective in that regard. The status of the United States as the sole superpower in the world and the extensive amount of foreign assistance that we provide to countries that are dependent on us has facilitated success. However, this is not a failsafe method of avoiding ICC jurisdiction, as it depends on political stability or instability, the political

landscape in other countries.[61] It also furthers international criticism of the United States for the stand that we have taken on the court.

FOREIGN POLICY IMPLICATIONS OF THE UNITED STATES OBJECTIONS

The substantive objections to the Rome Statute and the ICC are not without merit. Any opportunity for debate and change, though, has passed as we have chosen not to be a part of the ICC. Instead, we have taken steps to ensure that United States citizens are immune from its jurisdiction. Further, there is a perception that we are actively seeking to undermine the ICC, despite our statements to the contrary, by attempting to influence other nations against the ICC.[62] It is these efforts, and concern about what our approach will mean in the long run, that has created consternation. Certainly, we must consider the long-term impact of the approach that we have taken on the ICC, and that requires an assessment of the pros and cons, and the risks associated with this course of action. The most illuminating assessment of the pros and cons of the ICC, and the potential impact on our foreign policy, is that presented to Congress from the Congressional Research Service. As stated above, one side of the argument is that is that "the ICC is a fundamental threat to U.S. armed forces, civilian policy makers, and U.S. defense and foreign policy."[63] The other side of the argument is that the ICC is a "valuable foreign policy tool for defining and deterring crimes against humanity, a step forward in the decades-long U.S. effort to end impunity for egregious mass crimes."[64] Against the backdrop of those counter-arguments, the Congressional Research Service lists the foreign policy implications of our non-membership as follows:

1. The United States is no longer eligible to participate on an equal basis in setting the ground rules.
2. Continuation of the tension between enhancing the international legal justice system and encroachment on what is perceived as legitimate use of force.
3. Lack of U.S. participation may impair the ICC's ability to function, by taking away a major resource for arresting suspects and enforcing verdicts of the ICC, thus serving the interests of human rights abusers.
4. Cause the United States to lose the moral high ground and damage our reputation world-wide, including an adverse affect on our ability to influence the development of the law of war.

5. United States may be seen as bolstering the perception of our unilateral approach to world affairs and unwillingness to abide by the same laws that apply to other nations, thus undermining our efforts at coalition building.[65]

GRAND STRATEGY APPRAISAL AND ANALYSIS

From the Grand Strategy perspective, two questions must be asked: What does the position taken by the United States mean? And, what are the long term implications of the United States position? In many respects, it represents a cross between a liberal multilateralist and unilateralist approach to grand strategy. One writer has described the approach taken by the United States on the International Criminal Court, as well as proposals for other international agreements, as "acting in the world but not being entangled by it.[66]

Certainly, the bedrock of our grand strategy, whatever approach it takes, is our position as a leader in the world community. Leadership usually includes selflessness and putting aside one's personal interests for the good of all. On the other hand, leadership requires making tough, unpopular decisions when it is required. The strategic approach that we have taken on the International Criminal Court is that we are obviating the leadership role, and reverting to an "us against the world" approach.

The position taken by the United States on the International Criminal Court certainly appears to be inconsistent with international peace and stability, abhorrence of crimes against humanity, and the value that we place on the rule of law – it presents a daunting task of reconciliation. Even more important, however, are the problems identified in the assessment from the Congressional Research Service set forth above. Even though we are not a member of the ICC, and can no longer influence the Court directly, we are, or could be, subject to its jurisdiction. For the majority of the countries in the world, this is not a difficult problem. For the United States, however, it is significant. A quick assessment of the number of locations where service members are deployed around the world underscores the basic problem.

Our objections to the ICC cannot, however, be viewed in a vacuum. The interaction between the United States and the United Nations, and the international community in general, often requires that the United States government reconcile seemingly inconsistent positions. We have shown our commitment to international stability and peace, and have committed resources and military forces to numerous locations around the world to protect vital interests. As the only world superpower, however, we are acutely aware of our vulnerabilities and how other nations may seek to exploit those vulnerabilities to elevate their own status in the world or, at a more basic level, to inflict pain and punishment on the United States and its citizens.

Protection of individual soldiers or individual citizens, however, is not the problem. It is the potential impact of universal criminal jurisdiction on our foreign policy and the restrictions that such jurisdiction has on our freedom to act alone, if deemed appropriate, that we will not compromise.

In light of the number of nations that have ratified the Rome Statute and endorsed the International Criminal Court, we have obligated ourselves to ensuring on a case-by-case basis that United States citizens are protected from its jurisdiction. That obligation is not going to disappear in the near future. So far, we have been successful with this approach.[67] Further, there is a significant risk that our status in the world, how other nations view our willingness to work with the world community on issues of international concern, may be adversely affected. Ironically, our efforts to protect our own citizens will effectively undermine the credibility of the court, despite the fact that we have no say so in how the Court is administered. From a national strategy perspective, however, the decision to opt out of the Rome Statute and the International Criminal Court is the result of logical analysis and is supportable.

The United States certainly has an enduring interest in insuring that those who commit the types of crimes contemplated in the Rome Statute are held accountable. As noted above, the United States agrees with most, if not all, of the general objectives of the Statute and the Court. The United States has taken a quasi-isolationist approach to the Court, in lieu of deferring to an international institution, because that approach better complements our overall strategic approach. The means of addressing crimes of the type contemplated by the Rome Statute already exists, as evident by the tribunals convened in Rwanda and the Former Yugoslavia. What makes these ad hoc of tribunals preferable to the permanent court is the involvement of the United Nations Security Council, a forum in which we still exercise considerable influence.

In its simplest terms, our position on the International Criminal Court is just one part of our response to the events of September 11, 2001, and the new emphasis on preemptive self-defense. Our position is not so much based on a mistrust of international institutions, like the ICC, as it is an unwillingness to jeopardize our ability to take matters into our own hands and ensure that appropriate action is taken against international criminals who strike against the United States – the dominant unilateralist grand strategic approach. In many respects, our experience with the United Nations and the United States Security Council, particularly in recent years, certainly gives us reason to pause.[68] In my opinion, we are simply preserving the freedom to act unilaterally, a freedom of action that would not exist to the same degree if we were obligated to the International Criminal Court. As the lone remaining superpower, this freedom is critical.

CONCLUSION

The approach that the United States takes in foreign relations is complex and often leads to very difficult decisions. The considerations that go into a decision on how we will deal with other countries and the international community, in general, are endless. Quite often we are forced to make decisions based on instinct and speculation, mindful that there will be adverse consequences. Our position on the International Criminal Court is just such a decision. It is easy to argue that our approach is just another indication of the conservative, go-it-alone nature of the current administration. That ignores, however, the historical position that we have taken, going back almost one hundred years, on the basic concept of an international criminal tribunal. It also ignores the fact that the Clinton administration, while supportive of the concept, went into the pre-Rome Statute conferences intent on protecting our sovereignty by making the complementarity statute as strong as possible, a prerequisite to prosecution of any American citizen.

In this writer's opinion, we have gone down a road from which there is likely no return—even if a later administration were in favor of "coming back into the fold," Congress would have to amend or repeal the American Servicemembers Protection Act, an unlikely prospect. What we are left with is dealing with the consequences of choosing not to play in an institution supported by over a hundred nations worldwide, including many of our allies.

Ironically, we have to take positive steps, the bilateral agreements for example, to attempt to avoid the jurisdiction of the court. Even those agreements do not ensure complete protection. Even more important, however, is the negative perception that we have created with the rest of the international community by choosing not to support an institution whose primary mission is to address genocide, violations of human rights, and war crimes. Certainly, we are in a position of power, economically, militarily, and diplomatically. While we may have lost the initial informational battle on the International Criminal Court, we certainly have the ability to overcome any negative perceptions on this issue. What the United States must do is ensure that the conduct of its soldiers and citizens abroad does not any opportunity for invocation of the provisions of the Rome Statute and, ironically, continue to enforce the basic purpose and intent of the International Criminal Court.

WORD COUNT= 5476

ENDNOTES

[1] http://www.usaforicc.org/about_index.html, accessed January 2, 2004.

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Ibid. Chief Judge Everett is the founder of the Center on Law, Ethics, and National Security and member of the faculty at Duke University Law School.

[6] American *Servicemembers Protection Act of 2002*, Public Law 107-206 (August 2, 2002).

[7] Under Secretary of State for Arms Control and International Security John R. Bolton Memorandum to UN Secretary General Kofi Annan, New York, NY, 6 May 2002. http://www.state.gov/r/pa/prs/ps/2002/9968pf.htm, accessed 17 January 2004. The text of the statement reads as follows:

"Dear Mr. Secretary-General:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.

Sincerely,

S/John R. Bolton"

[8] George W. Bush. *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002), 31. The NSS states:

> "We will work together with other nations to avoid complications in our military operations and cooperation, through such mechanisms as multilateral and bilateral agreements that will protect U.S. nationals from the ICC. We will implement fully the American Servicemembers Protection Act, whose provisions are intended to ensure and enhance the protection of U.S. personnel and officials."

[9] Ibid. Introduction . The introduction states, in part: "We are also guided by the conviction that no nation can build a safer, better world alone. Alliances and multilateral institutions can multiply the strength of freedom-loving nations. The United Stats is committed to lasting institutions like the United Nations, the World Trade Organization, the Organization of American States, and NATO as well as other long-standing alliances. Coalitions of the willing can

augment these permanent institutions. In all cases, international obligations are to be taken seriously. They are not to be undertaken symbolically to rally support for an ideal without furthering its attainment."

[10] Ibid.

[11] Ibid., 31, *Transform America's National Security Institutions to Meet the Challenges and Opportunities of the Twenty-First Century*.

[12] Treaty of Versailles, 28 June 1919, Article 227 provided for a special tribunal to try Kaiser William II, former German Emperor. The objective was to hold William II of Hohenzollern, the German emperor, responsible for the "supreme offence against international morality and the sanctity of treaties." In what would be a precursor to criticism of the whole concept of an international criminal court throughout the twentieth century, William II was never brought to trial because the Netherlands refused to extradite him. The Versailles Treaty, *http://history.acusd.edu/gen/text/versaillestreaty/ver227.html*. Accessed 3 January 2004

[13] Ibid., 33.

[14] Ibid., 34.

> "Following this attempt to establish an international criminal tribunal, proposals for the establishment of a permanent international criminal court issued from many quarters. None was ever officially considered. During this phase of the ICC's history, three major obstacles arose. First the question of sovereignty was omnipresent. An international court that could try and sentence individuals was simply incompatible with the conception that international law governed only the relations between States.
>
> Second, critics pointed to the absence of positive law for violations of which potential defendants could be charged. Some argued that there could be no international criminal law because there was no international sovereign power, while others questioned whether an international criminal code would have to be adopted before an international criminal court could be established.
>
> Finally, not all agreed that an international criminal court could help to prevent war, the fundamental premise of the court's establishment. Of course, no one seriously suggested that the proposed court alone could prevent war. Rather, they hoped that the ICC's establishment would contribute to that goal. But some contended that the ICC would actually worsen international relations: 'This Court would render a peace impossible. When the soldiers and sailors had finished the fighting, when hostilities were over and the soldiers and sailors on both sides were ready to shake hands with one another, as they are today, the lawyers would begin a war of accusation and counter accusation and recrimination. Such a war would render a peace of reconciliation impossible."

[15] Department of the Army, *International Law Volume II,* DA Pamphlet 27-161-2 (Washington, D.C.: U.S. Department of the Army, 23 October 1962), 221. Even though the Allies requested extradition of hundreds of Germans for trial under the Treaty, Germany refused

to comply. As a compromise, the Allies agreed to allow the German government to try the suspected war criminals. Twelve were actually brought to trial in the Leipzig trials in 1921.

[16] The Versailles Treaty, http://history.acusd.edu/gen/text/versaillestreaty/ver227.html at 34.

[17] Sarah B. Sewell and Carl Kaysen, eds., *The United States and the International Criminal Court* (Oxford, England: Rowman & Littlefield Publishers, Inc., 2000), 35 (Leila Nadya Sadat, *The Evolution of the ICC: From the Hague to Rome and Back Again*), 35.

[18] Ibid.

[19] Ibid. The International Military Tribunal at Nuremberg held that "individuals, including heads of state and those individuals acting under orders, could be held criminally responsible under international law; that the constitution of an international criminal tribunal contravenes the sovereignty of states per se; and established the wrongfulness of aggression…war as well as offenses against the laws of war could be criminalized."

[20] Ibid.

[21] Ibid., 36.

[22] Ibid.

[23] Department of the Army, *Military Law Review,* Department of the Army Pamphlet 27-100-149, Volume 149 (Washington, D.C,: U.S. Department of the Army, Summer 1995), 49-64. Professor M. Cherif Bassiouni was one of the presenters at "Nuremberg and the Rule of Law: A Fifty-Year Verdict," a Conference co-sponsored by The Center for National Security Law, University of Virginia, The Center of Law, Ethics and National Security, Duke University School, and The Center for Law and Military Operations, The Judge Advocate General's School, United States Army.

[24] Prevention and Punishment of the Crime of Genocide," G.A. Resolution 260B(III), reprinted in *United Nations Resolutions, Series I: Resolutions of the General Assembly* 2, ed. Dusan J. Djonovich (1957), 320; cited in Sarah B. Sewell and Carl Kaysen, eds., *The United States and the International Criminal Court* (Oxford, England: Rowman & Littlefield Publishers, Inc., 2000), 35 (Leila Nadya Sadat, *The Evolution of the ICC: From the Hague to Rome and Back Again*), 35.

[25] Ibid., 36-37.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] Ibid., 37-38.

[31] Ibid. A coalition of sixteen Caribbean and Latin American nations led by Trinidad and Tobago introduced the 1989 resolution. Oddly enough, their concern was with drug traffickers, and they desired that the International Law Commission study the crime of drug trafficking across national borders. The idea of an international court that could consider such crimes was implied in their resolution. See also "Summary Records of the Forty-Second Session," *Year Book of the International Law Commission* 1, U.N. Doc. A/CN.4/SER.A/1990, 39, 24.

[32] Ibid., 38.

[33] Ibid.

[34] *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1988). http://www.un.org/law/icc/statute/romefra.htm. Accessed 7 March 2004.

[35] Sarah B. Sewell and Carl Kaysen, eds., *The United States and the International Criminal Court* (Oxford, England: Rowman & Littlefield Publishers, Inc., 2000) (Lawrence Weschler, *Exceptional Cases n Rome: The United States and the Struggle for an ICC*), 85-102.

[36] Ibid.

[37] Sarah B. Sewell and Carl Kaysen, eds., *The United States and the International Criminal Court* (Oxford, England: Rowman & Littlefield Publishers, Inc., 2000) (David J. Scheffer, *The U.S. Perspective on the ICC, David J. Scheffer*), 115-118.

[38] Data on the countries that have ratified the Rome State is available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp.

[39] BBC News Online, http://news.bbc.co.uk/1/low/world/1095580.stm, accessed 1 February 2004. Israel and Iran also signed on the same day.

[40] Congressional Research Service, *U.S. Policy Regarding the International Criminal Court: Report for Congress.* (Washington, D.C.: U.S. Congressional Research Service, September 2002), 2.

[41] Ibid. The complete text of President Clinton's remarks at Camp David on 31 December 2000 are as follows:

> The United States is today signing the 1998 Rome Treaty on the International Criminal Court. In taking this action, we join more than 130 other countries that have signed by the 31 December, 2000 deadline established in the Treaty.
>
> We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.
>
> The United States has a long history of commitment to the principle of accountability, from our involvement in the Nuremberg tribunals that brought Nazi war criminals to justice to our leadership in the effort to establish the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Our action today

sustains that tradition of moral leadership. Under the Rome Treaty, the International Criminal Court will come into being with the ratification of 60 governments, and will have jurisdiction over the most heinous abuses that result from international conflict, such as war crimes, crimes against humanity and genocide.

The treaty requires that the ICC not supersede or interfere with functioning national judicial systems; that is, the ICC prosecutor is authorised to take action against a suspect only if the country of nationality is unwilling or unable to investigate allegations of egregious crimes by their national.

The US delegation to the Rome Conference worked hard to achieve these limitations, which we believer are essential to the international credibility and success of the ICC.

In signing, however, we are not abandoning our concerns about significant flaws in the treaty.

In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not.

With signature, however, we will be in a position to influence the evolution of the court. Without signature, we will not.

Signature will enhance our ability to further protect US officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC.

In fact, in negotiations following the Rome Conference, we have worked effectively to develop procedures that limit the likelihood of politicized prosecutions. For example, US civilian and military negotiators helped to ensure greater precision in the definitions of crimes within the court's jurisdiction.

But more must be done. Court jurisdictions over US personnel should come only with US ratification of the treaty.

The United States should have the chance to observe and assess the functioning of the court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor, submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.

Nonetheless, signature is the right action to take at this point. I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide, and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead.

[42] Sarah B. Sewell and Carl Kaysen, eds., *The United States and the International Criminal Court* (Oxford, England: Rowman & Littlefield Publishers, Inc., 2000) (Lawrence Weschler, *Exceptional Cases n Rome: The United States and the Struggle for an ICC*), 102-111.

[43] The text *of* the entire statute is available at *http://www.un.org/law/icc/statute/romefra.htm.*

[44] The *Preamble* to the Statute states as follows:

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows .....

http://www.un.org/law/icc/statute/romefra.htm

[45] Sarah B. Sewell and Carl Kaysen, eds., *The United States and the International Criminal Court* (Oxford, England: Rowman & Littlefield Publishers, Inc., 2000) (Bartram S. Brown, *The Statute of the ICC*), 63. The following quote from Lawrence Weschler, a conference attendee, succinctly presents the United States position:

> "And yet, as the Conference lumbered toward its climax, the U.S. delegation seemed increasingly gripped by a single overriding concern. Senator Jesse Helms, the Republican head of the Foreign Relations Committee, had already let it be known that any treaty emerging from Rome that left open even the slightest possibility of any Americans ever, under any circumstance, being subjected to judgment or even oversight by the Court would be 'dead on arrival' at his committee. The Pentagon was known to be advancing a similarly absolutist line. The State Department, sugarcoating the message only slightly, regularly pointed out how, in Scheffer's [David Scheffer, Ambassador-at-Large for war crimes issues] words, 'The American armed forces have a unique peacekeeping role, posted to hot spots all around the world. Representing the world's sole remaining superpower, American soldiers on such missions stand to be uniquely subject to frivolous, nuisance accusations by parties of all sorts. And we simply cannot be expected to expose our people to those sorts of risks. We are dead serious about this. It is an absolute bottom line with us.'" Ibid., Lawrence

Weschler , *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, 91-92.

[46] Sarah B. Sewell and Carl Kaysen, eds., *The United States and the International Criminal Court* (Oxford, England: Rowman & Littlefield Publishers, Inc., 2000) (Bartram S. Brown, *The Statute of the ICC*), 65.

[47] See generally Sarah B. Sewell and Carl Kaysen, eds., *The United States and the International Criminal Court* (Oxford, England: Rowman & Littlefield Publishers, Inc., 2000) (Lawrence Weschler, *Exceptional Cases n Rome: The United States and the Struggle for an ICC*), 85-111.

[48] The current State Department fact sheet on the Court, published in 2002, lists the problems with the Rome Statute and the ICC as follows:

1. Jurisdiction. The ICC purports to have jurisdiction over certain crimes committed in the territory of a state party, including by nationals of a non-party. Thus the court would have jurisdiction for enumerated crimes alleged against U.S. nationals, including U.S. service members, in the territory of a party (Article 12), even though the U.S. is not a party.
2. New crimes. A state party to the treaty can "opt out" of crimes added by amendment to the statute, thereby exempting its nationals from the ICC's jurisdiction for these crimes. A non-party cannot opt out (Article 121). This is unacceptable.
3. Aggression. The crime of aggression is included within the court's jurisdiction, but has not been defined. The parties to the treaty will amend it to define this crime and specify the conditions for exercise of jurisdiction over it (Article 5). Only parties to the treaty can opt out of the jurisdiction of the court over the crime of aggression per Article 121. In addition, many states advocate conditions for the exercise of jurisdiction by the ICC that could bring the court into conflict with the Security Council and the UN charter.
4. Prosecutor. The prosecutor can proceed with an investigation on his or her own initiative with the agreement of two judges of a three judge panel (Article 15). This could lead to politically motivated prosecutions.
5. The prosecutor is not responsible to an elected body or to the UN Security Council, and the court lacks fundamental checks and balances.
6. Reservations. In a serious departure from common practice, the treaty does not permit states to take reservations. (Article 120).
7. Complementarity. The ICC is required to defer to the national prosecution unless the court finds that the state is unwilling or unable to carry out the investigation or prosecution (Article 17). However, by leaving this decision ultimately to the ICC, the treaty would allow the ICC to review and possibly reject a sovereign state's decisions not to prosecute or a sovereign state's court decisions not to convict in specific cases.
http://www.policyalmanac.org/world/archive/state_international_criminal_court.shtml.

[49]Ambassador Prosper lists the following objections:

1. The United States believes the best way to combat abuses of international law is through reinforced domestic institutions--judicial and otherwise.
2. We must expand our reach by asking each state to strengthen and maximize use of its unilateral tools.
3. States should enact domestic laws to prosecute violators of international humanitarian law.

4. UNSC should provide political direction when there is a threat to or breach of international peace and security.

5. Any international response should be particularized and focused.

6. Past international tribunals were necessary because there was a lack of geographical clarity in determining jurisdiction, not because of the subject matter. Similar specific problems existed in the Balkans for the former Yugoslavia and in Rwanda. The UNSC sponsored approach brings ownership to the state (Sierra Leone, for example) while providing needed international financial and legal resources. This is the model that must be supported and is a template for the future.

7. **The ICC does not advance democratic principles and operates outside the well-established boundaries of international responses to breaches of international peace and security. It undermines the role of the UNSC of maintaining international peace and security and improperly empowers three individuals to make decisions that potentially affect international security and the fate of conflicts. The ICC will not have the benefit of the essential exchange and debate that takes place at the United Nations and there is a serious risk that the court will operate in a vacuum** [emphasis added]**.**

8. There must be checks and balances within the international system, a mechanism for securing international peace and stability in the UN Charter, and existing treaties and customary international law. Such important decisions that can affect the fate of entire conflicts need to have the benefit of political debate and safeguards. Ambassador Prosper's complete remarks are available at http://www.state.gov/s/wci/2002/12176pf.htm

[50] Ibid. Ambassador Prosper emphasizes the United States' commitment to the following principles:

1. Stopping inhumanity is an objective that we all must seek.

2. Nuremberg proved that high ranking political and military leaders are not beyond the reach of the law and can be brought to justice.

3. We are committed to remaining at the forefront of assuring international peace, stability, and justice.

4. The international community must work together to prevent terrorism and disregard for international law.

5. The international community must create a web of security to aggressively promote the rule of law, punish those who commit the most serious crimes of concern to the international community, and establish clear lines of responsibility.

[51] The State Department Fact Sheet, *International Criminal Court*, http://www.policyalmanac.org/world/archive/state_international_criminal_court.shtml. The Fact Sheet outlines the alternatives as follows:

- Domestic Accountability. Encourage states to pursue credible justice at home rather than abdicating responsibility to an international body.
- Where domestic legal institutions are lacking but domestic will is present, the international community must be prepared to assist in creating the capacity to address the violations. This includes political, financial, legal, and logistical support.
- Where domestic will is non-existent, the international community can intervene through the UN Security Council, consistent with the UN charter. Ad hoc international mechanisms may be created under the auspices of the UN Security Council, as was done to establish the international tribunals for the former Yugoslavia and Rwanda. Or, hybrid courts consisting of international participants and the affected state participants

can be authorized, such as in the case of Sierra Leone.

[52] Congressional Research Service, *U.S. Policy Regarding the International Criminal Court: Report for Congress.* (Washington, D.C.: U.S. Congressional Research Service, September 2002), 2, referencing Department of Defense Appropriations for 2002, P.L. 107-117.

> Sec. 8173. None of the funds made available in division A of this Act may be used to provide support or other assistance to the International Criminal Court or to any criminal investigation or other prosecutorial activity of the International Criminal Court.

[53] *American Servicemembers Protection Act of 2002*, Public Law 107-206 (August 2, 2002), sections 2002(8) and (9).

[54] Ibid., section 2005.

[55] Ibid., section 2007.

[56] Ibid., section 2007(d).

[57] *Rome Statute of the International Criminal Court,* Article 98, states:

> Cooperation with respect to waiver of immunity and consent to surrender
> 1. The Court may not proceed with a request for surrender or assistance which would required the requested state to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
> 2. The court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

[58] Such as those in progress in Liberia, Bosnia, Kosovo.

[59] As of 1 February 2004, there are approximate 71 such agreements in effect, including 34 countries that are also signatories of the Rome Statute and the ICC. The basic language of these agreements is as follows:

> **Proposed Text of Article 98 Agreements with the United States**
> A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,
> B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,
> C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International

Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,
D. Bearing in mind Article 98 of the Rome Statute,
E. Hereby agree as follows:
1. For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
(a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
(b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal
Court.
3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to
the International Criminal Court by the third country, absent the expressed consent of the Government of X.
4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.
5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

[60] *American Servicemembers Protection Act of 2002*, Public Law 107-206 (August 2, 2002), section 2008(a).

[61] Columbia was initially hesitant to sign a waiver agreement but, under the pressure created by withdrawal of financial aid, eventually signed the agreement. Christopher Marquis, "Latin American Allies of U.S.: Docile and Reliable No Longer," *New York Times*, 9 January 2004.

[62] In addition to the aforementioned American Service members' Protection Act of 2002, and resolutions that we have obtained from the United Nations to immunize service members stationed abroad from the ICC's jurisdiction, we have threatened to cut off military aid to countries that do not agree to sign bilateral agreements exempting American citizens from the Court's jurisdiction.

[63] Congressional Research Service, *U.S. Policy Regarding the International Criminal Court: Report for Congress.* (Washington, D.C.: U.S. Congressional Research Service, September 2002), 21.

[64] Ibid.

[65] Ibid., 21-22.

[66] G. John Ikenberry, *American Grand Strategy in the Age of Terror, Survival* 43, No. 4 (Winter 2001), 26.

[67] As of 30 January 2004, 82 countries had signed an agreement with the United States, including 34 ICC States Parties. http://www.wfa.org/issues/wicc/article98/article98home.html, accessed 7 March 2004.

[68] While we have generally enjoyed more success with the United Nations than we did during the Cold War, the threat of United Nations Security Council hampered our efforts on Kosovo and Iraq.

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